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IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE, DIVISION I
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

2005 JUN 1 11:56

DAVID C. TOWNSEND CLERK

STATE OF TENNESSEE

)

evidentiary hearing requested DC

)

vs.

)

No. 2005-D-2854

)

ARTHUR WAYNE MARCH
and PERRY AVRAM MARCH

)

)

DEFENDANT'S MOTION TO CONTINUE TRIAL

Comes now the accused, by and through counsel, pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 8 and 9 of the Constitution of the State of Tennessee, and Rules 12(b) and 47 of the Tennessee Rules of Criminal Procedure, and moves to continue the trial of this action, which trial is presently scheduled to begin on June 5, 2006. For cause the accused would show as follows:

- 1) The jury trial of the instant case is set to begin on June 5, 2006. The accused is also charged in Case No. 2004-D-3113 with one count of second degree murder, one count of abuse of a corpse and one count of tampering with evidence. The jury trial of Indictment No. 2004-D-3113 is set to begin on August 7, 2006.
- 2) The accused is also charged in Indictment No. 99-B-1290, which alleges theft over

ten thousand dollars (\$10,000). The jury trial of Case No. 99-B-1290 is set to begin on April 17, 2006.

- 3) The State of Tennessee on February 23, 2006 filed a motion to continue the trial of Case No. 99-B-1290. At ¶4 of the State's motion to continue that case, counsel for the State avers:

"To date, the defendant's cases have drawn considerable media coverage. The State anticipates that this coverage will continue. If this case, 99-B-1290, were tried first, the State fears that potential jurors in the remaining two trials could be prejudiced by increased media coverage, thereby increasing the difficulty in selecting a fair and impartial jury in the subsequent cases."

- 4) For purposes of Case No. 2004-D-3113 and the instant Case No. 2005-D-2854, the accused acknowledges the validity of the State's concern that publicity attendant to an earlier occurring jury trial of Mr. March carries significant potential to taint the prospective jurors in later occurring trials of Mr. March. Counsel for the accused in the instant case (who also represent the accused in Case No. 2004-D-3113) share that concern.
- 5) As the Supreme Court of Tennessee has opined in another context, "proverbially speaking, what is applicable to the goose ought to be applied to the gander." *State v. Watkins*, 804 S.W.2d 884, 886 (Tenn. 1991).
- 6) As regards the extent of the pretrial publicity in this matter, defense counsel would

incorporate by reference the affidavits and documents filed in support of the accused's previously filed motion to permit individual, sequestered voir dire. Counsel would request an opportunity to supplement these materials at an evidentiary hearing if necessary.

- 7) "Due process requires that the accused receive a trial by an impartial jury free from outside influences." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 553, 96 S.Ct. 2791, 2800, 49 L.Ed.2d 683 (1976), quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). As counsel for the State has sagaciously recognized in Case No. 99-B-1290, prospective jurors in later occurring trials of Mr. March are more likely than prospective jurors in sooner occurring trials to be tainted or infected by publicity attendant to the multiplicity of trials in this matter. It follows logically that the case in which Mr. March is potentially subjected to the most severe penalty should be tried first.
- 8) Where pretrial publicity is so pervasive as to threaten the fundamental fairness of a criminal trial, a continuance of the trial until the threat to the fairness of the trial abates is one of the remedies available to the Court to ameliorate the harmful effect of pretrial publicity. See, *Nebraska Press Ass'n, supra*, 427 U.S. at 553; *Sheppard, supra*, 384 U.S. at 363. *Nebraska Press Association* mandates that measures short of prior restraint upon protected First Amendment freedoms must first be employed. 427

U.S. at 568–570.

- 9) If convicted in any of the pending cases, the Defendant would be sentenced in Range One as a standard offender. In Case No. 2004-D-3113, the accused is potentially subject to a maximum aggregate confinement of thirty-three (33) years (with twenty-five (25) years to be served at one hundred percent (100%) release eligibility¹ and eight (8) years at thirty percent (30%) release eligibility) and aggregate fines of up to sixty-three thousand dollars (\$63,000). In Case No. 2005-D-2854, the accused is potentially subject to a maximum confinement of twenty-five (25) years' confinement and a fine of fifty thousand dollars (\$50,000) if convicted of conspiracy to commit first degree murder or an aggregate twenty-four (24) years' confinement and an aggregate fine of fifty thousand dollars (\$50,000) if convicted of two counts of solicitation of first degree murder²; release eligibility for any offense alleged in Indictment No. 2005-D-2854 would be at thirty percent (30%). In Case No. 99-B-1290 the accused is potentially subject to six (6) years' confinement and a fine of up to ten thousand dollars (\$10,000).

¹Tenn. Code Ann. § 40-35-501(I).

²Dual convictions for conspiracy and solicitation for conduct designed to culminate in commission of the same offense are expressly prohibited by statute. Tenn. Code Ann. § 39-12-106(a).

- 10) Constitutional due process guaranties call for such procedural protections as the particular situation demands. *Phillips v. State Board of Regents*, 863 S.W.2d 45, 50 (Tenn. 1993); *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). In both civil³ and criminal⁴ cases, the Supreme Court of Tennessee has adopted the analytical framework of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976), as to what process is due in a particular situation. The *Mathews* test requires a court to consider:

(1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mills v. Wong, supra, 155 S.W.3d at 924; *Phillips, supra*, 863 S.W.2d at 50.

- 11) The procedural safeguard here sought by Mr. March is a continuance of a relatively less important case until a demonstrably more important case is disposed of. The private interest at stake here is the accuracy of a criminal proceeding that places up

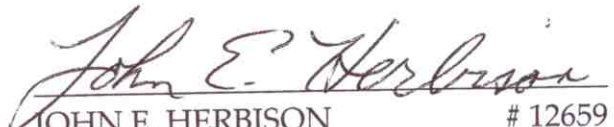
³See, e.g., *Mills v. Wong*, 155 S.W.3d 916, 924 (Tenn. 2004); *Phillips v. State Board of Regents*, 863 S.W.2d 45, 50 (Tenn. 1993).

⁴*State v. Barnett*, 909 S.W.2d 423, 426 (Tenn. 1995). See also, *Wilson v. Wilson*, 984 S.W.2d 898, 902 (Tenn. 1998) (criminal contempt proceeding arising out of antecedent civil case).

to thirty-three (33) years of Mr. March's liberty at risk—an "almost uniquely compelling" interest which "weighs heavily" in the due process analysis. *State v. Barnett, supra*, 909 S.W.2d at 426–427. The risk of erroneous deprivation, absent the requested continuance, is high—a risk that Mr. March will be tried for murder by a jury tainted by avoidable publicity. The State's interest, of course, "is not that it shall win a case, but that justice shall be done." *State v. Culbreath*, 30 S.W.3d 309, 313 (Tenn.), quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935). Moreover, if both the murder and conspiracy/solicitation cases are to be tried, the State's fiscal interest and any administrative burden to the State are unaffected by the order in which the trials occur. Each *Mathews* factor accordingly favors—indeed, each factor overwhelmingly favors—the granting of the requested continuance.

THE FOREGOING PREMISES CONSIDERED, the Defendant Perry Avram March respectfully moves this Court to continue the trial of the instant indictment until disposition of the more serious second degree murder and related charges alleged in Case No. 2004-D-3113.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that a correct and complete copy of the foregoing has been hand-delivered to the Office of the District Attorney General, 222 Second Avenue North, Nashville, Tennessee 37201, and to C. Edward Fowlkes, 172 Second Avenue North, Suite 218, Nashville, Tennessee 37201, this 1st day of March, 2006.


JOHN E. HERBISON